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No. 94-34

In the Supreme Court of the United States

OCTOBER TERM, 1994

OSCAR B. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the district court properly denied petitioner's motion to quash a grand jury subpoena requiring petitioner's law firm to produce records of fee information relating to a client.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8a-15a) is unpublished, but the judgment is noted at 26 F.3d 130 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1994. The petition for a writ of certiorari was filed on July 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury issued a subpoena to petitioner's law firm for documents relating to fee arrangements between the firm and one of its clients. After petitioner

refused, on behalf of the firm, to comply with an order entered by the United States District Court for the District of Nevada requiring production of the subpoenaed documents, he was held in civil contempt. C.A. E.R. 68-73.[1] The court of appeals affirmed. Pet. App. 8a-15a.

1. During 1993, a special federal grand jury in the District of Nevada was investigating possible violations of federal law by Natale Richichi and others. In February 1993, Richichi was arrested on an indictment returned by a different federal grand jury in the District of Nevada. The indictment charged Richichi with conspiring to bribe a union official. Richichi retained petitioner to represent him on that charge. Gov't C.A. Br. 2, 4.

On December 6, 1993, petitioner's law firm, Goodman & Chesnoff, was served with a document subpoena issued by the special grand jury. The subpoena required the firm to produce documents relating to the fee arrangements governing the firms' representation of Richichi and four of his relatives from February 1, 1993, to the date of the subpoena. Pet. App. 3a; Gov't C.A. Br. 3. Specifically, the subpoena sought production of "[a]ny and all records of any form of payment," including "retainer agreements; all billings; the date(s), amount(s), and means of all payments received; the identity of the person(s) or entities making the payments; and copies of *all* checks, money orders, and/or cashier's checks used to make the payments." C.A. E.R. 6; see Pet. App. 1a.

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[1] We cite to the version of the district court order reproduced in the Excerpts of Record filed in the court of appeals because that order is not reproduced fully or accurately in petitioner's appendix. Pet. App. 3a-7a.

On March 22, 1994, after several extensions of the compliance date, petitioner appeared before the grand jury on behalf of the firm. He refused to produce the subpoenaed documents or to acknowledge their existence. He argued that compelling his firm to comply with the subpoena would violate his Eighth Amendment rights and Richichi's Sixth Amendment right to counsel. Petitioner's Eighth Amendment argument was based on the fact that the IRS was investigating the firm because of its failure to complete an IRS Form 8300 for the legal fees paid in cash to the firm for its representation of Richichi.[2] Petitioner contended that if the subpoenaed documents revealed that he had not completed the form, and if the IRS imposed a civil fine upon petitioner for his failure to do so, the fine would violate the Eighth Amendment's proscription of excessive fines. Pet. App. 4a; Gov't C.A. Br. 3.

The government filed a motion in the district court for an order to show cause why the firm should not be required to comply with the subpoena. At a hearing on the motion on April 19, 1994, petitioner agreed to produce one document concerning a pledge of real estate by one of Richichi's relatives to secure payment of Richichi's legal fees. Petitioner also represented that the firm had no records of any payment or fee arrangement relating to the firm's representation of Richichi's relatives. Petitioner, however, continued to refuse to produce any other records of fee information relating to the law

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[2] An IRS Form 8300 must be completed by "[a]ny person" who is "engaged in a trade or business" and "who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)." 26 U.S.C. 6050I(a); see Pet. App. 10a n.4.

firm's representation of Richichi. Pet. App. 4a; Gov't C.A. Br. 4-5.

2. On April 26, 1994, the district court ordered the law firm to comply with the grand jury subpoena with respect to fee information concerning its representation of Richichi. Pet. App. 3a-7a; C.A. E.R. 68-73. The court determined that "[w]hether the Eighth Amendment protects [petitioner] from penalties the IRS may seek to impose for failing to fully comply with Form 8300 requirements is an issue unrelated to whether [petitioner] must comply with the Grand Jury's subpoena." C.A. E.R. 70. It accordingly held that "the Eighth Amendment is not implicated by the subpoena." *Ibid.*

The court further held that the subpoena did not violate Richichi's Sixth Amendment right to counsel. C.A. E.R. 70-71. The court reasoned that the subpoena did not affect Richichi's right to counsel in the pending bribery prosecution, because the government had represented that the investigation of the special grand jury that issued the subpoena was not related to the bribery charge. *Id.* at 71. Moreover, in the court's view, Richichi could not claim a Sixth Amendment right with respect to any offenses under investigation by the special grand jury until formal adversary criminal proceedings were commenced against him based on those offenses. *Ibid.*

Finally, the court rejected petitioner's claim that the subpoena sought information protected by the attorney-client privilege. C.A. E.R. 71-72. The court found that petitioner "has not demonstrated the existence of exceptional circumstances that might compel this Court to apply the last link doctrine, nor is there anything in the circumstances of this case to suggest that the information sought by the Government 'would in any way convey the substance of confidential professional

communications.'" *Id.* at 72 (footnote and citation omitted).

On May 3, 1994, petitioner reappeared before the grand jury and again refused to comply with the subpoena. After a hearing on May 13, 1994, the district court held petitioner in civil contempt but stayed its order pending petitioner's appeal. Gov't C.A. Br. 5.[3]

3. The court of appeals affirmed the civil contempt order entered against petitioner. Pet. App. 8a-15a. It first held that the grand jury subpoena did not violate petitioner's Eighth Amendment rights. *Id.* at 9a-11a. It reasoned that compliance with the subpoena could not reveal that petitioner had not properly completed the IRS Form 8300 for Richichi's fees, because "the IRS [was] already aware that [petitioner] failed to entirely complete" the form. *Id.* at 10a. The court also rejected petitioner's argument that compliance with the subpoena would waive his Eighth Amendment claim. *Id.* at 10a-11a.

The court of appeals further held that the subpoena did not violate Richichi's Sixth Amendment rights. Pet. App. 11a-13a. The court stated that the government cannot "interfere with impunity in the attorney-client relationship before the right to counsel 'attaches' under [*Kirby* v. *Illinois*, 406 U.S. 682 (1972)]." Pet. App. 12a. It thus rejected the district court's view that the Sixth Amendment was inapplicable to the special grand jury's investigation. *Ibid.* The court of appeals determined, however, that petitioner's Sixth Amendment claim was "premature and speculative." *Ibid.* The court explained

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[3] Two days before he was held in contempt, petitioner appeared on Natale Richichi's behalf at an initial appearance on a second indictment returned by a federal grand jury in the Southern District of Florida charging Richichi with racketeering, mail fraud, and extortion. Gov't C.A. Br. 4.

that petitioner had not shown "that the grand jury subpoena was issued for an improper purpose such as harassment or other prosecutorial abuse" or that "compliance will create an actual conflict between him and his client, Natale Richichi, that interferes with their attorney-client relationship." *Id.* at 12a-13a.[4]

The court of appeals rejected petitioner's argument that the grand jury subpoena interfered with the attorney-client privilege. Pet. App. 13a-15a. The court observed that that privilege ordinarily does not protect "[i]nformation regarding the fee arrangement" between an attorney and his client. *Id.* at 14a. The privilege would not attach here, the court stated, "even if the records pertaining to the fee arrangements between Richichi and [petitioner] evidenced some wrongdoing by Richichi." *Id.* at 15a. Instead, the court determined, the fee records would be privileged only if their disclosure would "in and of itself reveal [a] confidential communication." *Ibid.* Petitioner's claim of privilege thus failed, the court held, because he "presented no records or information to the district court in its in-camera hearing supporting his theory that production of fee records would provide the essence of any confidential communication." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 5-10) that he was precluded from complying with the grand jury subpoena by a state ethical rule that has been adopted in the

[4] The court of appeals also noted that petitioner "should have informed his client in advance that fee information is generally unprotected." Pet. App. 13a. "Having failed to do so," the court concluded that petitioner "cannot instead rely on the Sixth Amendment right to counsel as a basis for refusing to produce the fee records." *Ibid.*

District of Nevada. Petitioner did not present that claim in the court of appeals, however, and the court of appeals did not address it. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); see also, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 760 n.6 (1984).

In any event, petitioner's claim does not merit further review. Petitioner's claim rests (Pet. 7, 10) on Rule 156 of the Nevada Supreme Court Rules. That rule provides that, with exceptions not pertinent here, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." See Pet. App. 17a. The Ninth Circuit has construed that rule not to forbid a lawyer from disclosing client fee information pursuant to a grand jury subpoena. *In re Grand Jury Proceedings (Chesnoff)*, 13 F.3d 1293, 1297 (1994) (relying on Rule 1.6 of the Model Rules of Professional Conduct (1983)). Petitioner does not even cite the Ninth Circuit's decision, much less offer contrary authority.

2. Petitioner renews his contention (Pet. 10-18) that compliance with the grand jury subpoena will interfere with the attorney-client privilege. The court of appeals correctly rejected that contention. Pet. App. 13a-15a.

First, there is no support for petitioner's broad argument (Pet. 12-13) that information about a client's fee arrangements with his or her attorney is generally protected by the attorney-client privilege because its disclosure reveals that the client has hired a lawyer. See generally *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). To the contrary, it is well settled that fee

information ordinarily is not protected by the privilege. See, *e.g.*, *United States* v. *Ritchie*, 15 F.3d 592, 602 (6th Cir. 1994), petition for cert. pending, No. 94-50; *United States* v. *Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States* v. *Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-505 (2d Cir. 1991); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565, 567 (7th Cir. 1990); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247-248 (2d Cir.) (en banc), cert. denied, 475 U.S. 1108 (1986).

There is likewise no support for petitioner's argument (Pet. 10-12) that client fee information is privileged if its disclosure would tend to incriminate the client in the matter for which legal advice has been sought.[5] Rather,

[5] Petitioner for the first time makes the related argument (Pet. 13-18) that the subpoena should have been quashed solely because of its timing. "The only time any of the circuits have been willing to quash a subpoena * * * is when the timing of the subpoena amounted to harassment or interference with trial preparation." *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1494 (10th Cir. 1990). Petitioner cannot establish either of those grounds. The Ninth Circuit correctly determined that petitioner "has not shown that the grand jury subpoena was issued for an improper purpose such as harassment." Pet. App. 12a. Moreover, petitioner has not alleged that compliance with the subpoena would have interfered with his preparation for any trial of Richichi, nor could he do so. The government represented to the district court in this case that the client fee information described in the grand jury subpoena is being sought only in connection with the offenses under investigation, and not in connection with the bribery offense with which Richichi has been charged (Gov't C.A. Br. 4); the district court accepted that representation (C.A. E.R. 71). Although petitioner has argued that compliance with the subpoena could require him to become a witness against Richichi, the court of appeals rejected that argument. Pet. App. 13a. Thus, although petitioner did not raise his timing argument below, the courts below determined that petitioner cannot establish the grounds

the courts of appeals have uniformly held that fee information is privileged only if its disclosure would itself reveal a confidential communication. See *In re Grand Jury Proceedings (GJ90-2)*, 946 F.2d 746, 748 (11th Cir. 1991); *In re Grand Jury Matter*, 926 F.2d 348, 351-352 (4th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1125 n.11 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1491-1492 (10th Cir. 1990); *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1043 (11th Cir. 1990); *Tornay* v. *United States*, 840 F.2d 1424, 1428 (9th Cir. 1988); *In re Shargel*, 742 F.2d 61, 62 n.2, 63-64 (2d Cir. 1984); *United States* v. *Liebman*, 742 F.2d 807, 810 (3d Cir. 1984); *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 493-495 (7th Cir. 1984); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 453 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984); *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983).[6]

Petitioner has not shown and cannot show that the grand jury subpoena sought information that, if disclosed, would reveal a confidential communication protected by the privilege. The subpoena sought only

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necessary to support such an argument. Those factbound determinations do not warrant further review.

[6] Any support petitioner's position might once have derived from the Ninth Circuit's decisions in *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 (1977), and *Baird* v. *Koerner*, 279 F.2d 623, 635 (1960), has been eliminated by the Ninth Circuit's subsequent decisions in *Tornay* v. *United States*, *supra*, and *In re Osterhoudt*, *supra*, cited in the text. See also *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 496-498 (9th Cir. 1986).

records of the amount of the fees that petitioner received, the dates on which the fees were received, and the source of the fees. As the court of appeals noted (Pet. App. 14a), the government said that it would allow petitioner to redact any portion of the fee records that constituted a privileged communication. See Gov't C.A. Br. 19. As the court of appeals also noted, petitioner "presented no records or information to the district court in its in-camera hearing supporting his theory that production of fee records would provide the essence of any confidential communication." Pet. App. 15a. Because petitioner failed to show that production of the client fee information would reveal any privileged communication from his client, the court of appeals correctly concluded that the information is not protected by the attorney-client privilege.

3. Finally, petitioner renews his contention (Pet. 18-21) that compliance with the grand jury subpoena would violate his Eighth Amendment rights. He argues that disclosure of the client fee information to the grand jury may result in fines by the IRS for his failure fully to complete IRS Form 8300, and that those fines would violate the Eighth Amendment's proscription of "excessive fines." That argument is insubstantial. Contrary to petitioner's suggestion (Pet. 20), the Eighth Amendment does not create a "privilege" against the disclosure of client fee information to a grand jury, even if that disclosure would lead to the imposition of an unconstitutionally excessive fine. See *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977); see also *United States* v. *Lovett*, 328 U.S. 303, 317-318 (1946). As the courts below correctly recognized, the Eighth Amendment provides a basis for challenging a fine only after it has been imposed. Pet. App. 10a; C.A. E.R. 70. Petitioner

therefore cannot invoke the Eighth Amendment to avoid compliance with the grand jury subpoena. Pet. App. 10a.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

SEPTEMBER 1994

[7] The cases upon which petitioner relies (Pet. 20-21) are inapposite. In *Minnesota* v. *Murphy*, 465 U.S. 420, 429-434 (1984), this Court held that a probationer's incriminating responses to questions during a probation interview may be used against him if he does not assert his Fifth Amendment privilege against compulsory self-incrimination and if he does not face a revocation of his probation for refusing to answer the questions. In *Austin* v. *United States*, 113 S. Ct. 2801, 2811-2812 (1993), the Court concluded that the Eighth Amendment Excessive Fines Clause applies to the civil forfeiture provisions in 21 U.S.C. 881(a)(4) and (a)(7) because those provisions constituted punishment for Eighth Amendment purposes. And in *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947 (1994), the Court held that a tax on the possession of dangerous drugs, conditioned on commission of a crime, constituted punishment for double jeopardy purposes.